Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

(2)

No. 96-1813

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IBP, Inc. and Diane Arndt,
Petitioners,

v.

Kevin Wilson,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF IN OPPOSITION

David L. Brown
Counsel of Record
218 6th Ave., 8th Floor
Des Moines, Iowa 50311
(515) 244-2141

Randall J. Shanks
409 West Broadway
Council Bluffs, Iowa 51503

Counsel for Respondent

36 pp

Counter-Statement of Questions Presented

I. **Whether the Supreme Court of Iowa correctly applied BMW v. Gore, 134 L.Ed.2d 809 (1996), to fix punitive damages at $2 million given the intentional threat of physical harm to Respondent's health and safety from Petitioner's conduct?**

II. **Whether Petitioners' claim that receipt by the State Civil Reparations Trust Fund of a portion of the punitive damage award under Iowa Code § 668A.1(2)(b) violates due process is properly before the Court when it was not raised in the State courts?**

Parties Involved and Rule 29.6 Statement

Following the decision below, the Civil Reparations Trust Fund was granted permission to intervene. (App. p. 47a) The Trust Fund is created pursuant to Iowa Code § 668A.1(2)(b) (1995) and is under the control of the Governor and four other elected executive officers of the State of Iowa. Iowa Code § 7D.1 (1995) Funds are disbursed only for indigent civil litigation or insurance assistance programs. Iowa Code § 668A.1(2)(b) (1995).

Table of Contents

Table of Authorities v

Statutory Provision Involved 1

Statement of the Case 2

Course of Proceedings Below 2

Factual Background 3

Reasons for Denying the Writ 7

A. The Supreme Court of Iowa correctly applied the settled law of BMW v. Gore 7

The degree of reprehensibility supports the decision below 9

Ratio alone is not determinative 13

There are no statutory sanctions which can be compared to IBP's misconduct 15

The Gore concurrence supports the decision below 16

The need for deterrence supports the decision below 18

B. The Petition depends on resolution of disputed issues of fact and application of settled law to facts 19

C. The decision below is consistent with other federal and state cases 20

D. IBP has not preserved error regarding its claim of a Due Process violation in Iowa's statutory allocation of the punitive damage award 21

E. IBP has limited the remedy it seeks in this Court to a determination of whether summary reversal is warranted 24

Conclusion 27

Table of Authorities

Cases

Adams v. Robertson, 65 U.S.L.W. 4180 (1997) 22, 23

Adler v. Board of Education, 342 U.S. 485, 496 (1952) 22

BMW of North America v. Gore, 134 L.Ed.2d 809 (1996) 6, 8, 9, 13, 16, 18, 21

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549-50 (1987) 22

Burke v. Deere & Co., 780 F.Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993) 24

Continental Trend Resources, Inc. v. OXY U.S.A., Inc., 101 F.3d 634 (10th Cir. 1996), *cert. denied* (Docket No. 96-1546, May 27, 1997) . . 8, 10, 11, 16, 19

Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) 14

Eaton v. City of Tulsa, 415 U.S. 697 (1974) 26

Fernandez v. Curley, 463 N.W.2d 5 (Iowa 1990) 24

Lee v. Edwards, 101
F.3d 805 (2d Cir. 1996) 14, 15

Raley v. Ohio, 360
U.S. 423, 434-36 (1959) 22

Schweiker v. Hauser,
450 U.S. 785 (1981) 26

Spaur v. Owens-Corning
Fiberglas Corp., 510 N.W.2d
854 (Iowa 1994) 23

Street v. New York,
394 U.S. 576 (1969) 22

Yee v. City of Escondido,
503 U.S. 519 (1992) 22, 25

Statutes

Iowa Code § 85.27 (1995) 11

Iowa Code § 668A.1(1)(a) (1995) 8

Supreme Court Rules

Supreme Court Rule 10 7

Supreme Court Rule 14(g)(i) 21

No. 96-1813

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IBP, Inc. and Diane Arndt,
Petitioners,

v.

Kevin Wilson,
Respondent,

On Petition for Writ of Certiorari
to the Supreme Court of Iowa

BRIEF IN OPPOSITION

Respondent Kevin Wilson (hereinafter "Wilson") respectfully opposes the Petition for Writ of Certiorari to the Supreme Court of Iowa.

Statutory Provision Involved

Iowa Code § 668A.1 (1995) Punitive or exemplary damages

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating all of the following:

a. Whether, by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.

b. Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived.

2. An award for punitive or exemplary damages shall not be made unless the answer or finding pursuant to subsection 1, paragraph "a", is affirmative. If such answer or finding is affirmative, the jury or court if there is no jury, shall fix the amount of punitive or exemplary damages to be awarded, and such damagers shall be ordered paid as follows:

a. If the answer or finding pursuant to subsection 1, paragraph "b", is affirmative, the full amount of the punitive or exemplary damages awarded shall be paid to the claimant.

b. If the answer or finding pursuant to subsection 1, paragraph "b", is negative, after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

3. [This provision relating to discovery of defendant's wealth is omitted.]

Statement of the Case

Course of proceedings below

On May 27, 1997, IBP filed a notice of appeal to the

Supreme Court of Iowa from the entry of judgment in the Iowa District Court for Pottawattamie County dated April 30, 1997. A copy of the notice of appeal from the judgment entry is reprinted in the appendix to this brief in opposition.

Factual Background

Pursuant to Supreme Court Rule 15(2), Wilson objects to the factual summary presented by IBP.

The Supreme Court of Iowa determined that IBP had engaged in a course of willful and wanton conduct which threatened the health and safety of Wilson. (Slip. Op. at Petitioner's Appendix p. 21a-22a) (hereinafter "App.") This conduct was part of a larger practice of manipulating the health care received by injured employees by using economic pressure to force doctors to avoid expensive procedures and high disability ratings, punishing employees who complained about their treatment, and falsifying reports of injuries in internal reporting and to the Occupational Health and Safety Administration. (App. p. 21a-22a)

IBP, a self-insured employer under the Iowa Workers' Compensation Act, began its control over the treatment of injured employees by selecting only those doctors who were "ultra-conservative," meaning they would avoid surgery. (App. p. 21a) Surgical procedures are expensive themselves and often mean that the worker will be assigned a disability rating which is compensable under the workers' compensation system. (App. p. 21a)

After this selection process occurred, IBP would pressure doctors to limit treatment costs by refusing to refer new patients to doctors who did not prescribe inexpensive treatment. Specifically, one of Wilson's treating doctors, Dr. Agarwal, lost all referrals because he was not conservative enough in his treatment. He met with IBP and agreed to be more conservative in exchange for future referrals. (Tr. pp.

70-74) Dr. Agarwal was ultimately fired by IBP for ordering too many surgeries, but at the time he saw Wilson he was still in the good graces of IBP. (Tr. pp. 73-76, 101)

Diane Arndt was the IBP employee who was responsible for administering this workers' compensation program. Following his back injury, Wilson was sent to Dr. Agarwal who initially prescribed only bed rest. (App. p. 2a) After complaining about the lack of treatment, Wilson was sent to Dr. Hamsa. (Tr. pp. 101, 25) Although Arndt admitted at trial that she knew the injury was legitimate, when she learned that Dr. Hamsa ordered Wilson off work for two more weeks, her response was, "we'll see about that." (App. p. 19a)

After Wilson's condition failed to improve, Dr. Hamsa ordered three more weeks of bed rest with the understanding that without improvement, surgery would be necessary. (App. p. 19a) It was at this time, the Supreme Court of Iowa determined, that Arndt made good on her promise and intervened to avoid this increased expenditure. In a telephone conversation Arndt told Dr. Hamsa that IBP had videotaped Wilson "working on his car and out doing other activities without any apparent distress." (App. p. 19a) Of course, no such tape existed[1], Arndt knew this, admitted as much to her co-worker, Karen Beam, and intended with

---

[1] Although IBP refers to a video tape existing (Pet. p. 13, n. 4), this is not a videotape showing what Arndt claimed. IBP denied during discovery that any videotape existed. (Tr. 235-36, Ex. 13) About four weeks before trial IBP produced a tape showing Wilson walking (which was consistent with doctor's orders), but not doing any strenuous activity. (Ex. 17) There was no date imprinted on the tape or any report generated to show when the videotape was made. (Tr. pp. 229-30) There was sufficient evidence for the jury to conclude that IBP had fabricated this videotape for the purpose of furthering the "cover-up." This conduct, therefore, is certainly relevant to determining an appropriate sanction through a punitive damage award.

her deception to stop Wilson from getting needed surgery. The Supreme Court of Iowa expressly found that "Arndt knew this was a lie" regarding her statement to Dr. Hamsa. (App. p. 19a)

Karen Beam testified that Arndt asked her, after Wilson had hired a lawyer, to help create a cover-up story about confusing Wilson's case with another where a videotape existed. (App. at 20a-21a) Beam also warned Arndt about the dangers of interfering with medical treatment, but Arndt assured her that Dr. Hamsa would not mention the conversation. (App. at 20a)

Arndt admitted at trial that her lie "assisted" a change in Dr. Hamsa's plan of treatment for Wilson. (App. p. 20a) Dr. Hamsa confronted Wilson and accused him of lying. (Tr. pp. 32, 41, 46) Dr. Hamsa thereafter advised against surgery, ordered Wilson back to light duty, (Tr. pp. 91, 273, 276) and refused to provide any further treatment for the back injury. (Tr. pp. 36, 47, 287-88)

Wilson was ultimately treated by a neurosurgeon who performed surgery to correct the ruptured disc and impinged nerve condition. (Tr. pp. 35-38) Wilson settled his workers' compensation claim and instituted the case at bar seeking damages for breach of fiduciary duty and defamation.

At trial in the Iowa District Court IBP chose to present no evidence in its defense. (Tr. p. 322) The jury determined that IBP's actions toward Wilson were not isolated, but part of IBP's program to reduce workers' compensation costs. A "safety award system" had been instituted whereby employees of divisions of IBP with low injury statistics would receive gifts or cash bonuses. (App. p. 20a) One way in which statistics were improved was to require employees to punch in at work soon after being disabled by an injury. (App. p. 20a-21a) Although the employee would then return home to convalesce, these days would not be counted as lost due to injury. Wilson, for

example, was ordered in to work only three days after rupturing a disc in his back. (App. p. 21a) The Supreme Court of Iowa found that IBP required other workers to punch in on the same day as having surgery, (App. p. 21a) or the day after having his finger amputated. (App. p. 21a)

This practice of falsifying records carried over to illegally under reporting lost days to OSHA and reporting injuries incorrectly in internal documents so that they would not have to be forwarded to OSHA under applicable regulations. (App p. 21a)

IBP's callous attitude toward its employees was demonstrated by Arndt's "openly low opinion of workers, referring to them as 'idiots' and 'jerks.' She made remarks to doctors that other injured IBP workers were lying about their injuries," (App. p. 20a) and told treating physicians that "this guy's full of shit." (App. p. 20a.)

One method to encourage employee submission to IBP was to force those workers who complained about treatment decisions to work unpleasant light duty jobs including watching gauges in the rendering plant (where animal parts are boiled to produce byproducts). (App. p. 22a) The monotony of the work was compounded by the terrible smell associated with this type of animal processing. (App. p. 22a)

As the Supreme Court of Iowa stated:

> This climate of suspicion toward the legitimacy of injuries to workers and their treatment, well known to Arndt, could be found by a reasonable juror to corroborate a finding of willful and wanton disregard for the rights and safety of Wilson.

(App p. 22a)

The application of BMW of North America v. Gore,

134 L.Ed.2d 809 (1996), must be considered against this factual background and in light of the decision by the Supreme Court of Iowa to order a remittitur of $13 million (striking nearly 87% of the jury's award) based on both Gore and state law principles. Although certainly under these facts, IBP's deliberate and harmful conduct would have justified a substantially higher award than $2 million, the decision by the Supreme Court of Iowa is well within the due process parameters of Gore.

Reasons for Denying the Writ

A. The Supreme Court of Iowa Correctly Applied BMW v. Gore

Supreme Court Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons....A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Petition does nothing more than dispute how the Supreme Court of Iowa found facts and applied Gore. Under the long-established standards of this Court, these grounds do not give rise to a compelling reason to grant the writ.

This Court announced three principles in Gore which guide an inquiry into whether an award of punitive damages has been rendered consistent with the Due Process Clause of the Fourteenth Amendment. These settled principles of law were applied in the decision below after a thoughtful review

of the facts in the record.

First, a state may not allow a jury verdict which punishes conduct occurring in another state. Gore, 134 L.Ed.2d at 825. Of concern in Gore was that the disclosure policy at issue in the suit was legal in many other jurisdictions. Unlike in Gore, IBP's conduct would be tortious in any jurisdiction. Furthermore, conduct which occurred outside the state may be properly considered in "the determination of the degree of reprehensibility of the defendant's conduct." Id. at 825, n. 21

All of the tortious conduct suffered by Wilson was perpetrated in Iowa. IBP made no objection to the jurisdictional nature of the evidence at trial or on appeal to the Supreme Court of Iowa.

Second, the defendant must receive fair notice of what conduct will subject him to punishment. Although there was some question in Gore regarding the different types of disclosure laws in the several States, there can be no doubt that IBP was aware that a breach of fiduciary duty and defamation would subject it to liability. Iowa Code § 668A.1(1)(a) provides for punitive damages based on conduct "constitut[ing] willful and wanton disregard for the rights or safety of another." A similar statute was found by the Tenth Circuit to provide sufficient notice of the possibility of punitive damages in a case involving interference with contractual relationships and prospective business advantage. Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 638 (10th Cir. 1996), *cert. denied* (Docket No. 96-1546, May 27, 1997).

The third factor is whether the defendant has notice of the severity of the punitive damage award which may result. Gore, 134 L.Ed.2d at 826. Three "guideposts" are set forth to analyze: the degree of reprehensibility of the defendant's conduct, the ratio of the punitive award to the actual harm inflicted on the plaintiff, and the comparison

between the punitive award and the civil or criminal penalties that could be imposed for comparable misconduct. Id.

The degree of reprehensibility supports the decision below

The Court in Gore identified the degree of wrongdoing as "perhaps the most important indicum of the reasonableness of a punitive damage award." Id. at 826. "This principle reflects the accepted view that some wrongs are more blameworthy than others." Id. "The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages." Id. at n. 23 (citing Owen, A Punitive Damages Overview: Functions, Problems and Reform, 39 Vill. L. Rev. 363, 387 (1994)).

The Gore decision also noted that Dr. Gore suffered "purely economic" damages. Id. at 827. The conduct did not "effect [the] performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." Id. Factors such as "trickery and deceit" and "intentional malice" were also cited as allowing for higher punitive damage awards consistent with due process requirements. Id.

In every way which BMW's conduct could be characterized as less wrongful, IBP's is more so. The harm here was physical, not just economic. IBP lied deliberately about a critical fact, whereas BMW believed the damage to the car was immaterial as a matter of law. This is not a case of a doctor with a damaged luxury car; it is of an injured worker in need of medical care who was victimized by a corporate policy of deception and abuse. The difference is stark and cries out for a remedy.

The Tenth Circuit, applying the Gore decision, summarized the analysis of the level of misconduct as an

inquiry into:

> whether a defendant's behavior: causes economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target.

OXY, 101 F.3d at 638.

Applying this analysis to the facts at bar demonstrates the reasonableness of the decision of the Supreme Court of Iowa. IBP caused physical harm in the manipulation of the medical care provided Wilson by delaying his needed back surgery. Although Wilson was fortunate that his disc did not rupture further and cause more neurological problems during IBP's period of malfeasance, the type of conduct is markedly more serious than the loss of value in a luxury car.

The tortious behavior in this case is recognized as wrongful in every jurisdiction. The Court in Gore was concerned that BMW was punished for a disclosure policy which was legal in many states. Such is not a concern here.

The record demonstrates a pattern of conduct by IBP in pursuing lower workers' compensation expenditures regardless of the human cost. The Supreme Court of Iowa determined:

> The evidence indicated that Wilson's treatment as an injured worker was not a one-time or isolated instance. The interference with the diagnosis and treatment of his injury could have resulted in a pronounced worsening of an already serious condition. Other workers with injuries could be profoundly affected as a

> result of the policy actions carried out by Arndt and IBP.

(App. p. 32a) This case is squarely within the concept of "repeated acts" of wrongdoing and merits a higher award.

The conduct here was intentional as well, both in the implementation of the general business policy and in the deliberate falsehood told by Arndt to Dr. Hamsa. Although the specific nature of the deliberate conduct in OXY consisted of business torts rather than slander, there is nothing in that case to suggest a distinction between these types of misconduct.

Finally, IBP's actions were aimed at a highly vulnerable target. Aside from the manifest imbalance of power associated with the employee-employer relationship, IBP enjoyed statutory authority to control Wilson's medical care through the workers' compensation system. See, Iowa Code § 85.27 (1995). Furthermore, the jury determined that a fiduciary relationship existed between Arndt and Wilson at the time she lied to Dr. Hamsa. (App. pp. 9a-10a) It is also worth noting that the OXY court found vulnerable plaintiffs in the business competitors with the larger defendants. OXY, 101 F.3d at 639. As an individual, Wilson is even more vulnerable under this standard.

The flagrant misconduct of IBP is markedly different from the business decision made by BMW. When presented with the understandably difficult task of explaining away this damaging factor, IBP does nothing more than ignore the factual findings made by the jury, ignore the express statements of the Supreme Court of Iowa as to the state of the appellate record, and ignore those factors which were relevant in finding egregious conduct meriting a severe punishment.

For example, IBP goes on at length citing cases approving of the practice of putting injured workers under

surveillance. (Pet. pp. 11-12) IBP ignores the fact that there was no surveillance of Wilson which showed him violating his restrictions. It was the lie that was told about the existence of a videotape showing such a violation which lead to the decision here, not the idea of surveillance in general. IBP's argument is nothing more than a "red herring."

IBP attempts to cast the statements by Arndt to Dr. Hamsa as being "in large part true." (Pet. p. 11) IBP fails, again, to tell the whole story. The Supreme Court of Iowa specifically rejected the argument that the "gist or sting" of the defamatory statement was true:

> We agree with the trial court in that the essence of the alleged defamatory statement was that Wilson was faking the severity of his injury and was being untruthful to his doctor, *i.e.*, that he was a liar. It was not, as defendants suggest, that he was working on his car or driving his children to school.

(App. p. 13a)

This deception is made worse by the attempt to smear Wilson further by throwing in the fact that he was in jail during part of the time he was on medical restrictions. The trial court sustained the motion in limine made by the plaintiffs but allowed IBP to present evidence on a violation. The trial court simply ruled that the location of the alleged violation could not be mentioned.

IBP cannot avoid the fact that its version of events was not believed by the jury or the Supreme Court of Iowa. Nor can it ignore that the record which stands before this Court paints a damning picture of IBP's conduct, conduct which threatened the health and safety of Wilson and every other employee of IBP. This most important factor in determining reasonableness has been satisfied many times over.

Ratio alone is not determinative

IBP fundamentally misreads Gore by its reliance on the ratio factor as grounds for summary reversal. Gore does not require a particular ratio as the upper constitutional limit in isolation from other facts in the case. In fact, the Gore decision recognized that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." Gore, 134 L.Ed.2d at 831. The Court also stated it:

> cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say however that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.

Id. (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The 500:1 ratio present in this case is of little use in assessing the constitutionality of the decision below.

The Seventh Circuit recognized the difficulty in applying ratio analysis in a civil rights action where each plaintiff received $5,000 in compensatory damages and $60,000 in punitive damages:

> The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages ...
>
> The compensatory damages were low here in part because of the inherent difficulties of

> fixing a dollar equivalent for subjective injuries, such as fright and pain. An award of punitive damages proportioned to the low compensatory damages that were awarded would have a very meager deterrent effect, would fail to signal to the prison authorities that savage treatment of prisoners will not be tolerated, and would not be commensurate with the moral gravity of the defendant's action.

Cooper v. Casey, 97 F.3d 914, 919-20 (7th Cir. 1996) (Posner, J.) (internal citations omitted).

The Second Circuit applied similar logic in another civil rights claim, one based on malicious prosecution, where the jury awarded $1 compensatory damages and $200,000 in punitive damages.

The court stated:

> In Gore, a 500 to 1 ratio was "breathtaking." However, in a § 1983 case in which the compensatory damages are nominal, a much higher ratio can be contemplated while maintaining normal respiration. Since the use of a multiplier to assess punitive damages is not the best tool here, we must look to the punitive damages awards in other civil rights cases to find limits and proportions.

Lee v. Edwards, 101 F.3d 805, 811 (2d Cir. 1996). The court, after analyzing other awards in civil rights cases and the manner in which the jury had been instructed on who would pay the damages, ordered a remittitur of $125,000.

It should be noted that this 75,000 to 1 ratio was approved in a case where the malicious prosecution claim

"entailed little overt violence" and was based on a detention of two hours. Id. at 810. "[T]he jury ... was obviously unimpressed by Lee's claim to have suffered harm...." Id.

IBP is highly critical of the Supreme Court of Iowa's statement that the ratio was of "minor significance." (Pet. p. 14) IBP fails to recognize, however, that the Gore decision emphasized the degree of reprehensibility factor and qualified the application of ratio analysis when a low award of compensatory damages is based on an egregious act causing little economic harm. This is exactly the case at bar. The reduction of the $15 million award to a 500:1 ratio is therefore entirely consistent with Gore, and, indeed, a higher ratio would be justified given IBP's actions here. No valid basis to overturn the methodical review of previous punitive damage cases by the Supreme Court of Iowa has been demonstrated.

There are no statutory sanctions which can be compared to IBP's misconduct

In Gore, the Court was able to compare the punitive damage award to the consumer protection measures of Alabama law which provided penalties for non-disclosure of damage to a new car before safe. Here, however, the conduct at issue is not covered by any statutory measure because IBP violated common law tort duties. IBP has cited no provision of the Iowa Code or Iowa Administrative Code which, if applied to this case, would provide an adequate remedy for its misconduct. This factual difference limits the applicability of the third Gore factor.

As the Tenth Circuit stated when faced with the same issue:

> OXY's misconduct involved a violation of common law tort duties that do not lend

> themselves to a comparison with statutory penalties. The fundamental question is whether OXY had reasonable notice that its tortious interference with contracts and prospective business advantage could result in such a large punitive award.

OXY, 101 F.3d at 641.

The problem with IBP's analysis, as already stated, is that the wrongs committed here were not statutory in nature. The common law, not the Iowa legislature, provides the remedy to IBP's actions. IBP cannot possibly claim that they did not know manipulating with medical care, defamation and maintaining a culture of lying could result in a significant jury verdict.

The Gore Concurrence supports the decision below

The three concurring Justices in Gore recognized that if "fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." Gore, 134 L.Ed.2d at 833 (Breyer, J., concurring). This system of fair procedures, "need not be precise;" however, it "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." Id. at 834.

IBP expressly accuses the Supreme Court of Iowa of being blind to previous decisions of that court in determining that a $13 million remittitur was warranted. (Pet. p. 14) IBP's disrespectful argument that this unanimous, en banc, decision of the Supreme Court of Iowa ignored the law of Iowa is flatly inconsistent with the state law standards expressed by the court:

> In 1994, we decided Spaur .... We quoted the standards of Haslip and applied them on the posttrial review process. Id. at 867. Also in 1994, we had occasion to again consider a punitive damage award in Ezzone [v. Riccardi, 525 N.W.2d 388 (Iowa 1994)]. The suit involved an action against a bank for interference with shareholders' rights. Citing the Supreme Court case of Honda Motor Co. [v. Oberg, 512 U.S. 415 (1994)] as establishing due process requirements, we structured our review process as follows: ...
>
> Awards will be tested with a view of the extent and nature of the outrageous conduct, the amount necessary for future deterrence, and with deference to the relationship between the punitive award and plaintiff's injury, as reflected in any award for compensatory damages. In addition to these traditional factors, we shall consider all circumstances surrounding the conduct and relationship between the parties. Any provocation of the conduct by plaintiff will be a factor. We take the provocation to include participation in the conduct complained of.

(App. pp. 30a-31a)

The decision below was based on a comprehensive review of both federal and state law concerning punitive damages. IBP has couched its reasons for granting the writ in broad and argumentative terms without any showing of how the presumption of validity is overcome in this case. The Court should properly deny the petition as the Supreme Court of Iowa has faithfully applied due process analysis in ordering a remittitur of $13 million already and in so doing

set a level of punitive damages which reflects the outrageous conduct of IBP.

The need for deterrence supports the decision below

The Court in Gore recognized that when a "defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful [it] would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." Gore, 134 L.Ed.2d at 827. IBP's actions here were found by the Supreme Court of Iowa to be part of a repeated pattern of unlawful conduct and that the deterrent effect of punitive damages would be well served here. (App. p. 32a)

IBP argues that the use of the defendant's wealth by the Iowa court to aid in the determination of what level of punitive damages would be reasonable was inconsistent with Gore. (Pet. pp. 15-16) The Gore opinion simply held that a defendant's size does not alter the requirement of fair notice. "While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the Nation." Id. at 833.

Here, however, the size of the defendant is not being used to justify a lack of fair notice, it is being used to determine what is fair punishment. As the Tenth Circuit stated:

> From [Gore] we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits. Yet wealth must remain relevant, because $50,000 may be awesome punishment

> for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation....
>
> A rich defendant may act oppressively and force or prolong litigation simply because it can afford to do so and a plaintiff may not be able to bear the costs and the delay. We have held that the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award.

OXY, 101 F.3d at 641-42 (citations omitted). A substantial award of punitive damages is the only way to get the attention of IBP and have it realize its pattern of abusive conduct was and is completely unacceptable.

B. The Petition depends on resolution of disputed issues of fact and application of settled law to facts

Much of Petitioners' disagreement with the decision below rests on disputed assertions of fact. The Petition, for example, criticizes the Supreme Court of Iowa's conclusion that IBP's treatment of Wilson was "not a one-time or isolated instance." (Pet. p. 12) It complains of other claimed factual inaccuracies in the decision below. (Pet. p 13, n. 4) Although the Petition seeks to couch this argument in an assertion that the lower court "flouted" the guidelines in Gore (Pet. p. 10), the heart of Petitioners' argument is that the record does not support the Supreme Court of Iowa's application of the Gore factors to the facts of the case. (Pet. pp. 10-16)

The court found that IBP created a "climate of suspicion toward the legitimacy of injuries to workers and

their treatment" which a reasonable juror could find corroborated a finding of "willful and wanton disregard for the rights and safety of Wilson." (App. p. 22a) Yet, IBP characterizes Arndt's statements as "allegedly slanderous," being "in large part true," and claims that the conduct at issues was simply "legal conduct designed to preclude workers' compensation waste and fraud." (Pet. pp. 10-11)

Note four on page 13 of the Petition complains about "several fundamental inaccuracies" in the facts of the case. The issue of the videotape, however, was fully addressed by the decision below. The Supreme Court of Iowa found that there was never any videotape showing a violation of restrictions by Wilson. (App. p. 19a) (See, supra p. 4, n. 1) The remaining inaccuracy alleged by IBP is that Karen Beam was not really a nurse. IBP fails to cite any decision of this Court suggesting that it will grant a writ of certiorari, much less a summary reversal, on the basis of this kind of allegation of error. No compelling basis exists under Supreme Court Rule 10 for the exercise of the Court's judicial discretion when the claim of error is founded on factual determinations, especially those which are immaterial to the real issue of how IBP threatened Wilson's health and safety.

C. The decision below is consistent with other federal and state cases

IBP cites several cases in which Gore was applied to reduce punitive damage awards. None of the cases cited involve the type of wrongdoing involved in the case at bar. IBP was found to have engaged in conduct which threatened health and safety in addition to defaming Wilson. IBP offers cases dealing with business torts or, at worst, discrimination claims. Not one even remotely approaches IBP's misdeeds.

Furthermore, the above argument demonstrates that

each case must be carefully analyzed on its own merits to determine if the award violates the due process clause. There is no meaningful way for IBP to summarize each case in a few words or sentences and compare it to the instant case. Indeed, the Gore opinion stresses that due process analysis cannot be reduced to a bare comparison to previous punitive damage cases. Gore, 134 L.Ed.2d at n. 37.

D. IBP has not preserved error regarding its claim of a due process violation in the receipt of some of the punitive damages awarded to the Civil Reparations Trust Fund

IBP's argument that the provisions of Iowa Code § 668A.1 which require apportionment to the state's Civil Reparations Trust Fund of a portion of the punitive damage award is not properly before the court because IBP raises this issue for the first time in their petition.

Supreme Court Rule 14(g)(i) requires the Petitioner to make a:

> specification of the stage in the proceeding, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears...so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the

judgment on a writ of certiorari.

IBP has utterly failed to make the required specification. There has been no allegation that this issue has ever been raised and it was plainly not addressed by the Supreme Court of Iowa. It is, therefore, not properly before the Court.

It is a fundamental rule of Supreme Court practice that a federal claim cannot be considered by the Court unless it has either been raised in the state court or considered and resolved in the state court. Yee v. City of Escondido, 503 U.S. 519, 532 (1992). When the state court fails to pass expressly upon a federal question "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969). See, Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 549-50 (1987), Adler v. Board of Education, 342 U.S. 485, 496 (1952), Raley v. Ohio, 360 U.S. 423, 434-36 (1959).

"This rule [requiring raising of the issue in the state court] serves an important interest of comity." Adams v. Robertson, 65 U.S.L.W. 4180, 4181 (1997). "It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." Id. (internal quotation marks omitted) (citing Webb v. Webb, 451 U.S. 493, 500 (1981)).

The necessity to properly raise issues below is not insignificant:

> Our traditional standard also reflects practical considerations relating to this Court's capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary

> adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record.

Adams, 65 U.S.L.W. at 4181-82. Here, there is no information in the record or the decision below with which the Court could make a thoughtful analysis. The Court would be left to speculate regarding the validity of IBP's claim of abuse.

In addition to this fatal procedural posture, IBP has also failed to cite in its Petition the leading Iowa case upholding the constitutionality of Iowa Code § 668A.1 against a challenge on due process, double jeopardy and excessive fines grounds. See, Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854 (Iowa 1994). The Spaur court found:

> a clear distinction between the [Civil Reparations Trust] Fund and the general state treasury. The damage awards are not commingled with state revenues and are to be disbursed only for the "purposes of indigent civil litigation programs or insurance assistance programs."
>
> We explained in Shepard [Components v. Brice Petrides et al., 473 N.W.2d 612 (Iowa 1991)] that "a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it." Section 668A.1 "was designed to divert a portion of a resulting punitive damage award to a public purpose."

Id. at 868-69. The same result occurred in an excessive fines challenge in federal court. See, Burke v. Deere & Co., 780 F.Supp. 1225 (S.D. Iowa 1991), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993).

IBP incorrectly characterizes how the punitive damage award is apportioned in the statement of questions presented. It is not correct that "the State collects a 75 percent share of the punishment and pays the plaintiff's attorney's fees out of the punishment." (Pet. p. i) Under the Supreme Court of Iowa's conclusive interpretation of Iowa §668A.1, the State of Iowa only recovers punitive damages after the plaintiff has received 25 percent of the award and all applicable fees and costs have been paid, including attorney's fees. See, Fernandez v. Curley, 463 N.W.2d 5 (1990). The decision below applied the Fernandez rule. (App. pp. 33a-34a)

IBP has offered no explanation of how a private prosecution occurs given the divergence of interests between Wilson (who wants the entire punitive damage award) and the Fund (which wants its share). IBP wants nothing more than to have the Supreme Court rule that such a provision is per se unconstitutional. This argument has been waived, lacks support in the record, and is internally inconsistent.

E. IBP has limited the remedy it seeks in this Court to a determination of whether summary reversal is warranted

IBP has presented the Court with a petition specifically limited[2] to seeking summary reversal of the

---

[2] IBP expressly requests summary reversal in the questions presented (Pet. p. i), the reasons for granting the writ (Pet. pp. 10, 16) and in its conclusion. (Pet. p. 22) In contrast, IBP requests plenary (continued...)

unanimous, en banc, decision of the Supreme Court of Iowa. The only question before the Court in considering the correct application of Gore is, therefore, whether the Court may exercise the extreme remedy of summary reversal, not whether plenary review may be granted.

It is up to the petitioner to phrase the questions presented for review. The Court has stated previously:

> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee, 503 U.S. at 535. The freedom granted by the Court carries with it the necessity to phrase the questions precisely, and define those issues on which review is sought:

> The framing of the question presented has significant consequences...because under this Court's Rule 14.1(a), "[o]nly the question set forth in the petition, or fairly included therein, will be considered by the Court." While "[t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein," ibid., we ordinarily do not consider questions outside those presented in the petition for certiorari.

Id. (citing Berkemer v. McCarty, 468 U.S. 420 (1984)).

---

[2](...continued)
consideration of its claim that Iowa Code § 668A.1 violates the due process clause. (Pet. pp. 18, 22).

Under this principle, IBP has waived any claim to plenary review as to whether the lower court decision was consistent with Gore. While a request for plenary consideration might include the subsidiary question of whether summary disposal on the merits would be appropriate, the reverse is not true. As the late Justice Marshall wrote:

> A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.[3]

Schweiker v. Hauser, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). Because IBP has only sought the subcategory of options for review, summary reversal, it has foregone any claim to plenary consideration on this issue. Although the decision of the Supreme Court of Iowa survives even the normal standard for granting the petition contained within

---

[3] Petitioner cites the language of then-Justice Rehnquist that "summary reversal is appropriate in 'palpably clear cases of constitutional error.'" (Pet. p. 10) This citation somewhat disingenuously turns the standard expressed on its head. The full quote is:

> This Court each year reviews thousands of cases from the state courts, many of which, like this one, are characterized by less than perfect records. Reversal of state court judgments of conviction, especially in summary fashion, without argument, should be reserved for palpably clear cases of constitutional error.

Eaton v. Tulsa, 415 U.S. 697 (1974) (Rehnquist, J., dissenting).

Thus, as with the language of Justice Marshall in Schweiker, the rule of when summary reversal is appropriate is generally cast in negative terms, not the positive rule cited by Petitioner.

Supreme Court Rule 10, IBP's petition must be reviewed under the more stringent and extraordinary step of summary disposition.

Under this standard, and in light of the detailed and thorough application of the correct principles of law in the decision below, summary disposition is manifestly inappropriate. The petition should be denied.

Conclusion

Wilson respectfully requests the Court deny the Petition for Writ of Certiorari to the Supreme Court of Iowa.

David L. Brown
Counsel of Record
218 6th Ave., 8th Floor
Des Moines, Iowa 50311
(515) 244-2141
(515) 244-2931 (facsimile)

Randall J. Shanks
409 West Broadway
Council Bluffs, Iowa 51503